



ARTICLES

DIFFERENTIATED INTEGRATION IN EUROPE AFTER BREXIT: A LEGAL ANALYSIS

GIACINTO DELLA CANANEA*

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ABSTRACT: It is self-evident that the European Union has evolved over time and so has the relationship between unity and differentiation. Understanding the nature of this evolution is more difficult. This *Article* seeks to explicate this development, not by a temporal analysis, but by delineating two opposite political visions of the European construction, that is, the vision that is centred on the “ever closer union among the peoples of Europe” and that which postulates a wide and loose union. The differing solutions provided by these visions are examined with regard, first, to some mechanisms of differentiated integration, which are considered against the twin criteria of clarity and coherence and, second, with regard to other legal mechanisms, which imply an interaction between EU members and third countries. This can be useful for a better understanding of the institutional and legal options that are available for the future.

KEYWORDS: European Union – European integration – ever closer union – differentiated integration – enhanced cooperation – European Economic Area.

I. INTRODUCTION

The outcome of the referendum that has been held in the United Kingdom about leaving the European Union (Brexit) has fuelled the debate, in political and academic circles,

* Professor of Administrative Law, Bocconi University, giacinto.dellacananea@unibocconi.it. This *Article* is a revised and abridged version of the paper presented at the ECLN conference on Brexit’s institutional consequences, Lisbon Law School, June 24, 2017. I wish to thank the organizers, as well as all participants, particularly Paul Craig, Tom Eijsbouts, Jean-Victor Louis and Miguel Poiars Maduro for their comments. I am, however, the sole responsible for any error or omission.

about the future of the EU, in particular from the perspective of differentiated integration.¹ This *Article* seeks to contribute to the debate, by arguing that it should be made clear that the differing solutions that are proposed for the challenges with which the Union is confronted are based not only on different legal foundations, but also on distinct visions of the European construction. For analytical purposes, two opposite political visions can be delineated. At this stage, it suffices to characterize each of them in the briefest terms. There is, first, the vision that is centred on the idea, or ideal, of an “ever closer union among the peoples of Europe”, as provided by the Treaty of Rome’s preamble. The other vision of Europe postulates a wide and loose union where the members do not necessarily wish to change the current state of things.

It is precisely because these are political visions that they provoke passionate debates. But, for all their importance in social and political life,² passions do not help analytical clarity and coherence.³ My intent is to show the difference between a vision of the European construction that purports the achievement of the “ever closer union” and that of a wider and looser union. This distinction will be clarified in the first part of the *Article*. Next, some mechanisms of differentiated integration will be considered against the twin criteria of clarity and coherence. Finally, there will be a discussion of other legal mechanisms, which imply an interaction between EU members and third countries. This might be helpful for a better understanding of the how the issues arising from Brexit can be considered.

II. TWO VISIONS OF EUROPE

II.1. A FIRST CUT AT THE ARGUMENT

When discussing about differentiated integration, it is important to bear in mind that there is, not surprisingly, variety of opinions about the nature and purposes of European integration. Two opposite visions of Europe can be delineated. The vision of unified Europe that is based on the idea of the “ever closer union”, whilst recognizing the diversity of European peoples not only, descriptively, as an element of the real but also, prescriptively, as an element that must be preserved, aims at strengthening the ties between them. The other vision, which aims at achieving a wider and looser union, pays less attention to those ties and favours greater flexibility.

¹ For a discussion of the theories of European integration, see F.G. SNYDER, *European Integration*, in D.S. CLARK, *Encyclopedia of Law and Society*, Thousand Oaks: Sage, 1994, p. 1 *et seq.*; A. STONE SWEET, *Integration and the Europeanization of the Law*, in P. CRAIG, R. RAWLINGS (eds), *Law and Administration: Essays in Honour of Carol Harlow*, Oxford: Oxford University Press, 2003, p. 197 *et seq.*

² See A.O. HIRSCHMAN, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph*, Princeton: Princeton University Press, 1977.

³ P. CRAIG, *Constitutions, Constitutionalism and the European Union*, in *European Law Journal*, 2001, p. 125 *et seq.*

None of these visions is perfect. Nor can they be included in a sort of Hegelian dialectic, where the thesis and the antithesis culminate in a synthesis of some type. My intent is, rather, to show that the differences between the two visions of Europe are so profound that the significance of some central elements of European integration will differ depending upon the framework within which they are considered. This applies, in particular, to the various mechanisms of differentiated integration, which will be considered later.

II.2. AN “EVER CLOSER UNION”

With regard to the first political vision of Europe, three are the main themes underlying it: first, the meaning and relevance of the “ever closer union”; second, some elements of flexibility.

The first vision is well grounded in the genetic act of modern European integration, the Declaration of 9 May 1950 delivered by Robert Schuman, as well as by the Founding Treaties. The Declaration was premised on the necessity to eliminate the “age-old opposition of France and Germany”.⁴ However, its drafters were fully aware of the importance, for a polity, of the cultural and social construction of the sense of belonging. They thus proposed the creation of a community, viewed as a “first step in the federation of Europe”, through the achievement of a “*de facto* solidarity” between the Member States.⁵ The Treaty establishing the European Coal and Steel Community (Treaty of Paris) was based on the same strategy, but with an important linguistic shift. It did no longer refer only to the States, but aimed at laying the foundations of a community of peoples (a “*communauté plus large et plus profonde entre des peuples longtemps opposés*”).⁶ The Treaty establishing the European Economic Community (Treaty of Rome) sought to achieve the same goal. According to its preamble, this Community was created “among peoples long divided by bloody conflicts”. An adequate awareness of such conflicts was not, however, an obstacle to the choice of those peoples to give, through the institutions thus created, “direction to their future common destiny”. The Community was thus the first step towards “an ever closer union among the peoples of Europe”. This formulation was explicitly teleological, in the sense that it set out the *telos* of European integration.⁷

That not only the founding States, but also their peoples, are constitutionally relevant is of importance in helping us to understand the nature of the legal order of the Community. The Court of Justice, for example, referred to it in its famous ruling in *Van Gend en Loos*, when it argued that the European Economic Community (EEC) constituted

⁴ The Schuman Declaration – 9 May 1950, europa.eu.

⁵ *Ibid.*

⁶ Preamble du Traité instituant la Communauté Européenne du Charbon et de l'Acier, 18 April 1951.

⁷ For this terminology, see J.H.H. WEILER, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, and J.H.H. WEILER, *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, in *Singapore Journal of Legal Studies*, 2012, p. 248 *et seq.*

a “new legal order of international law” and established the direct applicability of the Treaty of Rome.⁸ This is not to say, however, that the Treaty of Rome was based on strong democratic mechanisms in the sense that all public power was channelled through parliaments.⁹ Quite the contrary, it simply set up a Common Assembly, certainly not an all-powerful body, though its institutional connection with national parliaments could be viewed in a different light today, in a period in which new attempts are being made to strengthen the ties between representative institutions.

The shift from States to peoples has had a number of important repercussions, the first of which is the pluralist conception of the social element. The Community was not simply premised on the recognition of the existence of a plurality of peoples but, precisely because its *telos* was to give rise to an “ever closer union” between those peoples, on the common understanding that no step would be taken to forge a single people or *demos*. Another consequence concerns the social element, which has a pluralist connotation. This has a further consequence, from the viewpoint of flexibility and of the differentiation that it can allow. Since the beginning, the legal order of the Community has been characterized by the existence of legal mechanisms allowing some form of flexibility. They can be justified in a simple manner: without some degree of flexibility the execution of legislation in very different areas of the same legal system can be very hard, if not impossible.

The Treaty of Rome provided for both a transitional period and for special arrangements. The transitional period was provided in order to give all the Member States enough time to adjust their internal institutional and legal arrangements to cope with the obligations stemming from their membership. Special legal arrangements were laid down either for some policies, by way of specific derogations, or for some parts of the territory of the Member States that were outside Europe. Interestingly, the Treaty of Rome expressed the partners’ will to “to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy, and the Netherlands”.¹⁰ It also specified that nothing precluded the existence of a regional union between Belgium, Luxembourg and the Netherlands, which stipulated an agreement in 1958. After the accession of Denmark, Ireland and the UK, other norms gave the latter some opt-out clauses and specified that the Treaty establishing the European Community (TEC) applied only partially to the Isle of Man and did not apply as

⁸ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos v. Administratie der Belastingen* (holding at para. II, that the “Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples”).

⁹ See P. CRAIG, *The Community Political Order*, in *Indiana Journal of Global Legal Studies*, 2003, p. 79 *et seq.*

¹⁰ Art. 131, para. 1, TEC. For further analysis, see D. HANF, *Flexibility Clauses in the Founding Treaties: From Rome to Nice*, in B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, Antwerpen: Intersentia, 2001, p. 4 *et seq.*

such to the Faroe Islands, though it could have been extended to them subsequently. However, these were very limited and specific areas, which could justify limited exceptions without undermining the postulates of the other conception of the constitutional framework of the Community.

II.3. A WIDER AND LOOSER UNION

The other vision of Europe, going ideally from the Atlantic Ocean to the Urals, is not new, though it has gained consent in the last two decades. Some elements of this vision can be traced in the Treaty of Paris. Its Preamble emphasized the intent to create a “broad” community. Accordingly, the Treaty of Paris established that “[a]ny European State may request to accede to the present Treaty”.¹¹ The Treaty of Rome used slightly different words. It established that “any European State may apply to become a member of the Community”.¹² It added a new element; that is, the Community’s capacity not only to conclude treaties with third countries and international organizations, but also to “establish an association” involving reciprocal rights and obligations.¹³

This political vision of the Community was converted into reality during the following decades. While membership has remained unchanged until 1973 and has changed by way of limited accessions during the following three decades,¹⁴ it has changed more radically after 2000, when ten new members have acceded the EU, followed by other three in the following years. An important step has thus been made toward the “broad” union envisaged fifty years earlier and a new policy has replaced that of gradual and limited extension of membership, with the consequence that the number of Member States was almost doubled.¹⁵

This was not without institutional consequences. If the 1990s had seen the rise of subsidiarity, which appeared both as a rationale and an operating tool for resolving the practical problems raised by the widening scope of Community policies, the following decade has been characterized by discourses about flexibility and differentiation. Many have argued that new and more flexible policy methods were necessary,¹⁶ including various forms of differentiated integration. Others have underlined the necessity to respect national constitutional identities. Both arguments can be better understood in the context of an analysis of the values upon which the Union is founded.

¹¹ Art. 98, para. 1, of the Treaty of Paris.

¹² Art. 237, para. 1, TEC.

¹³ Art. 238, para. 1, TEC.

¹⁴ Denmark, Ireland and the UK in 1973; Greece in 1980; Portugal and Spain in 1985; Austria, Finland and Sweden in 1995.

¹⁵ See C. LEQUESNE, *Les perspectives institutionnelles d'une union élargie*, in *Pouvoirs*, 1994, p. 129 *et seq.*

¹⁶ See H. WALLACE, *Flexibility: A Tool of Integration or a Restraint on Disintegration?*, Oxford: Oxford University Press, 2000.

As observed earlier, some elements of flexibility have been laid down since the early period of European integration. They are perfectly compatible with the first vision of Europe, that centred on the idea of an “ever closer union”. What characterizes the other vision of Europe, therefore, is not the recognition that some form of flexibility and differentiation is simply necessary. It is, rather, the use of normative and functional arguments in favour of institutional mechanisms that allow the Member States to follow different rules and paths, not just for a limited period of time, but for a longer period or forever.

Normatively, two main arguments might be used to support an increased differentiation of EU institutional and legal mechanisms. Firstly, it is coherent with the increasing internal differentiation of the EU. Secondly, it accords a prominent role to pluralism.¹⁷ The consequences of this change in attitude are important. There is the provision according to which the Union “respects the national identities” of its Member States.¹⁸ Other provisions aim at protecting cultural diversity. Interestingly, there is a shift between the Charter of Fundamental Rights of the European Union (Charter) and the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon). While the former imposed on the Union the obligation to respect “cultural, religious, and linguistic diversity”,¹⁹ the latter provides that the EU shall respect its “rich cultural and linguistic diversity”.²⁰

Functionally, it might be argued that a Union of almost thirty members, with very different political cultures and policy processes, requires a much greater degree of flexibility and differentiation. This is not necessarily an obstacle to the traditional functional or neo-functional strategy of creating *de facto* solidarity between the peoples of Europe on concrete issues. Rather, an approach that leaves much room for different national choices may preserve the dynamic of integration. In this sense, some observers have pointed out that, without the distinction between the various phases of the Economic and Monetary Union (EMU) and the opt-out clauses for Denmark and the UK, it would not have been possible for the other Member States to proceed in this path. This is an important point to which we shall return in the next section. Meanwhile, it is important to observe that, for all its appeal, the increasing recourse to differentiation is not without difficulties. In particular, it raises serious issues from the point of view of accountability, which is always more difficult in non-unitary frameworks than in unitary ones.²¹

¹⁷ For this perspective, see C. HARLOW, *Voices of Difference in a Plural Community*, in *American Journal of International Law*, 2002, p. 339 *et seq.* See also P. MANIN, J.V. LOUIS (eds), *Vers une Europe différenciée? Possibilité et limites*, Paris: Pedone, 1996.

¹⁸ Art. 4, para. 2, TEU, according to which national identities are “inherent in the fundamental structures, political and constitutional, inclusive of regional and local self-government” of each country.

¹⁹ Art. 22 of the Charter.

²⁰ Art. 2 TEU (emphasis added).

²¹ For this remark, see P. CRAIG, *European Governance: Executive and Administrative Powers Under the New Constitutional Settlement*, in *International Journal of Constitutional Law*, 2005, p. 436.

III. INSTITUTIONAL MECHANISMS OF DIFFERENTIATED INTEGRATION WITHIN THE EU

Thus far, we have seen that there is a tension inherent between two visions of Europe, with important consequences about the goals of the Union, the conception of its peoplehood and the legal tools for ensuring coherence and unity. We cannot, however, content ourselves with delineating this distinction. We must subject existing or proposed institutional mechanisms to careful scrutiny under the twin criteria of clarity and coherence.

There is, in particular, the need to ensure coherence between ends and means. Keeping this in mind, our discussion will continue with an analysis of what has been probably the single most important achievement after Maastricht; that is, the EMU. As a second step, enhanced cooperation procedures will be considered. Next, we will look at a recent and controversial treaty between most EU members, but not all; that is, the Fiscal Compact.

III.1. NO “EVER CLOSER” MONETARY INTEGRATION WITHIN THE EMU

Given the object and purposes of this *Article*, no attempt will be made here to synthesize the complex legal and institutional arrangements on which the EMU is based.²² Suffice it to mention few legal norms and facts that are substantially undisputed. First of all, the EMU is the main innovation from the viewpoint of the transfer of sovereign powers from the Member States to the EU, which is particularly visible in the adoption of a single currency. Secondly, and as a specification of this, institutionally the EMU consists of three distinct, though related, parts. There is the economic part, which rests in the hands of national governments, though under a set of common rules, while national budgetary policies are constrained by common targets, standards and checks, within the procedure of multilateral surveillance. There is, finally, monetary policy-making, which is conferred to the European Central Bank (ECB). Thirdly, institutional differentiation has been increased by the different choices made by the Member States. Three phases or stages were envisaged and while all the States that were members of the EU were included in the first one and could move to the next, the norms governing the EMU did not impose on them to ask to be included in the third stage, as it will soon be explained. A differentiated membership has thus emerged. Last but not least, unlike traditional common policies, the EMU is characterized by a complex variety of rules, including guidelines and technical opinions, and

²² On the road to the EMU, see N. THYGESEN, *The Delors Report and European Economic and Monetary Union*, in *International Affairs*, 1989, p. 637 *et seq.* For an outline of the main issues, see J.V. LOUIS, *The Economic and Monetary Union: Law and Institutions*, in *Common Market Law Review*, 2004, p. 575 *et seq.*, and F.G. SNYDER, *EMU – Integration and Differentiation: Metaphor for European Union*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 687 *et seq.* But see also G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014, p. 20 (referring to the EMU as an example of the more general crisis of the EU).

by the exemption from the ordinary mechanisms for ensuring compliance. All the rest is controversial, to say the least. In particular, it is disputed whether the policies followed by the ECB have saved the Euro, and with it the EU itself, or have just dissipated resources that should have been used otherwise.

The main question that arises is, however, another; that is, how the first and the third aspects mentioned earlier – that is, the fundamental importance of the EMU and its differentiated membership – can be reconciled. Jean-Victor Louis has suggested a twofold explanation, pragmatic and normative. Pragmatically, granting to Denmark and the UK an “opt-out” clause was the only way to obtain their consent to the revision of the Treaties, in view of the unanimity that was required. Normatively, he acknowledged that the special status granted to these members was “singular”. But he argued that, although such status appeared to be of indefinite duration, it was “*de facto* only temporary if the objective of an ever closer union is to be safeguarded”, and added that it was with this idea in mind that such status was conceded.²³ This is a very helpful contribution to the understanding of the complex decisions taken by the European Council. The normative argument that he has advanced is however problematic in some respects, in particular with regard to the potential dismissal of the goal of the “ever closer union”. A distinct but related question is whether the course of events made such goal unattainable.

Let us begin by clarifying a preliminary issue. It is often asserted that Denmark and the UK were granted an opt-out clause from the EMU, but this is not wholly correct. In fact, they were included in the EMU, but were not required to participate in its third stage, with the further caveat that Denmark obtained the acknowledgement of its right to take part in the third phase, after a positive assessment by the Council.²⁴ As regards the UK, all EU countries “recognized” that it “shall not be obliged or committed to move to the third stage” of the EMU without a decision of its representative institutions,²⁵ which according to the standard account means that it was granted an opt-in clause.

That said, normatively, the fact that the concession of a specific status to the UK and Denmark was “*de facto* only temporary” because of the necessity to safeguard the goal of the “ever closer union” is a weak counter to the literal argument that such status was conceded without any explicit deadline. There is a strong argument that runs in the contrary direction. As the Protocol no. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland (Protocol no. 15) on the EMU specified unequivocally, the UK “shall retain its powers in the field of monetary policy according to national law”.²⁶ As a consequence of this, a different law was to be, and was, applied.

²³ J.V. LOUIS, *Differentiation and the EMU*, in B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, cit., pp. 43-44.

²⁴ Art. 1, para. 1, of Protocol no. 16 on Certain Provisions Relating to Denmark (Protocol no. 16).

²⁵ Arts 1, and 9, let. c), of Protocol no. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland (Protocol no. 15).

²⁶ *Ibid.*, Art. 4. By virtue of Art. 4, some clauses of the EU Treaty did not apply to the UK.

Moreover, and as a variant of the preceding argument, the Treaty on European Union (Treaty of Maastricht) was an agreement between sovereign States and conventional international law is based, though not exclusively, on their explicit consent. As a result, it is hard to see how the fact that the specific status was conceded to the UK with the idea in mind that this situation would not last for a long time could influence the exercise of rights and duties under the Treaty. Even if it could be said that all partners agreed on this, this would not be conclusive against the ordinary criteria of interpretation.

Finally, the argument advanced by Louis with regard to the necessity to safeguard the goal of the “ever closer union” is ambiguous, in the sense that it can be read in two distinct ways. It is one thing to say that the Treaties and the other parts of the constitutional framework of the EU must be interpreted systematically, with the consequence that the specific status conceded to Denmark and the UK had to be used in the light of their commitment to contribute to the achievement of the “ever closer union”. It is another thing to say that, in the light of this commitment, their specific status *de facto* has a limited duration. We must be very careful when deducing particular consequence from a very general clause of the Treaty’s preamble. It is hard to see how it would possible to convert a permanent clause into a temporary one.

These findings support the conclusion that the solution envisaged by the drafters of the provisions governing the EMU, whilst allowing Denmark and the UK to join the Euro when they meet the requisite prescribed by the Treaties, at least potentially, deviated from the goal of the “ever closer union”. It remains to be seen how this potentiality was converted into reality and it is in this respect that the explanation provided by Louis is particularly helpful. Even a quick look at the course of the events shows, on the one hand, that both British and Danish officers participated in a variety of decision-making processes concerning the EMU and, on the other hand, that, soon after 1992, several measures were taken by national policy-makers, in particular within the UK, in order to make full membership possible.²⁷ For example, between 1993 and 1999 the Bank of England constantly monitored the preparation for the adoption of the single currency. Some years later, Gordon Brown, then Chancellor of the Exchequer, set out the economic conditions that had to be fulfilled so that this could occur.²⁸ This was not the case, however, though the adoption of the single currency was still supported by some economists when the crisis began.²⁹ A different choice has been made and its consequences are so well-known that few hints will suffice for our purposes here. The UK has kept its currency and has re-

²⁷ See, however, T. PROSSER, *The Economic Constitution*, Oxford: Oxford University Press, 2014, p. 142 (noting the “partial acceptance by the UK” of the objectives set out by the ECB).

²⁸ See the statement by Gordon Brown, *UK Membership of the Single Currency*, 27 October 1997, publications.parliament.uk.

²⁹ See W. BUITER, *Why the United Kingdom Should Join the Eurozone*, in *International Finance*, 2008, p. 269 *et seq.* For a survey of the literature, see T. SADEH, A. VERDUN, *Explaining Europe’s Monetary Union*, in *International Studies Review*, 2009, p. 277 *et seq.*

mained relatively insulated from the effects of the policies carried out by the ECB. Institutionally, this implies that the Governor of the Bank of England takes part only in the meeting of the General Council, a body with limited powers, but is not involved in decisions concerning the fixing of rates or, to refer the most salient decision taken by the ECB in the last years, in the purchase of national bonds. More concretely, the consequence of all this for citizens is that, unlike in other EU countries, in the UK a visitor needs to change currency.³⁰ In sum, the provisions of the Treaty determined a potential breach with the ideal of the “ever closer union”, though they left the door open.

Looking at the course of the events has a further advantage. It reveals that there is not simply a two-tier legal regime, whereby all EU countries are within the third stage except those who either cannot join it or do not wish to do so. Indeed, there is a more complex situation, with: *a*) nineteen countries within the Eurozone; *b*) other EU countries that are obliged to meet convergence criteria and that do so not without some difficulties (with the exception of Sweden); *c*) Denmark and the UK (until the end of negotiations for its exit from the EU) that have a specific status; *d*) some smaller European States (Andorra, Monaco, San Marino and Vatican City) that are using the Euro on the basis of a specific agreement; *e*) two Balkan countries that are unilaterally using the Euro (Kosovo and Montenegro). This last element shows the existence of asymmetric relationships between legal orders, which is not unknown to legal theorists,³¹ and that raises interesting issues from the viewpoint of both effectiveness and accountability.

III.2. ENHANCED COOPERATION: NATURE, RATIONALE AND IMPACT

As a second step, let us consider enhanced cooperation. There is a brief overview of the provisions on enhanced cooperation that have been laid down since the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam). On this basis, the rationale for enhanced cooperation is examined. Finally, we must consider some difficulties that have emerged in institutional practice.

Although some consider the provisions enacted by the Treaty of Amsterdam as a generalization of previous experiments in flexibility that had been agreed within the Treaty of Maastricht, institutional mechanisms differed, particularly with regard to the role of institutions.³² Moreover, those provisions initially excluded common foreign and

³⁰ G. DINAN, *Ever Closer Union. An Introduction to European Integration*, Basingstoke: Palgrave MacMillan, 2005.

³¹ From the viewpoint of general theory of law, see S. ROMANO, *L'ordinamento giuridico*, Firenze: Sansoni, 1946, Engl. transl. *The Legal Order*, Abingdon: Routledge, 2017.

³² See J.H.H. WEILER, *Editorial: Amsterdam, Amsterdam*, in *European Law Journal*, 1997, p. 309 (for the claim that the Treaty was important not only for its existence, but also for its institutional contents) and, for further details on enhanced cooperation, H. KORTENBERG, *Closer Cooperation in the Treaty of Amsterdam*, in *Common Market Law Review*, 1998, p. 833 *et seq.*

security policies. A change occurred with the Treaty of Nice Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Nice), though its Art. 27 B still excluded all “matters having military or defence implications”. It has been the Treaty of Lisbon, therefore, that has generalized enhanced cooperation, though within the substantive limits and procedural constraints that will now be clarified.

The essence of enhanced cooperation is that, according to the first paragraph of Art. 20 TEU, some Member States, not necessarily all, “may make use” of the Union’s institutions. It is, therefore, a mechanism that is “constituted” and regulated by the Treaty and which takes place within the institutional framework of the EU, unlike those of purely intergovernmental nature that will be examined earlier. The justification for the use of EU institutions is that the goal of enhanced cooperation is to “further the objectives of the Union, protect its interests and reinforce its integration process”.³³ However, its scope is limited to the areas for which the Union has non-exclusive legislative competence. Moreover, by virtue of the second paragraph of Art. 20 TEU, it is only if the Council has “established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” that an enhanced cooperation may take place. The Treaty also sets out a requisite concerning the minimum number of EU members (nine) that must be involved,³⁴ and specifies that the procedure laid down in Art. 329 TFEU shall be used. This requires the authorization issued by the Council, acting on a proposal made by the Commission and with the assent of the European Parliament. Participation in an enhanced cooperation has relevant legal consequences, in the sense that, though all members of the Council are enabled to participate in its deliberations, only those that represent the Member States participating in it “shall take part in the vote”.³⁵ On the other hand, their decisions will neither be binding on the other members of the EU nor will be regarded as part of the *acquis communautaire*.

Three comments can be made on the preceding textual analysis. They concern the nature, the rationale, and the impact of enhanced cooperation. Functionally, there is an analogy between enhanced cooperation and treaty revisions, because they both seek to adjust the process of European integration to the varying necessities and to the difficulties that inevitably arise in a Union of 27 (or 28) Member States.³⁶ However, there is also a fundamental difference. Unlike treaty revision, enhanced cooperation leaves the existing constitutional framework unaltered and is, therefore, not subject to ratification processes within national legal systems.

³³ Art. 20, para. 1, TEU.

³⁴ Art. 20, para. 2, TEU.

³⁵ Art. 20, para. 1, TEU.

³⁶ On this linkage, see P. CRAIG, *The Lisbon Treaty*, Oxford: Oxford University Press, 2013.

The rationale of enhanced cooperation becomes clear when considering that, according to the Treaty, enhanced cooperation is viewed as a “last resort”, when it has become undisputed that the members of the EU either cannot or do not wish to proceed in the same direction and with the same pace, though all members can join at a later stage, if they wish to do so. It is, therefore, an institutionalized differentiated integration, in the sense that it differs from the closer integration that can be achieved by the members that choose to sign an agreement outside EU Treaties, as it happened with the 1985 Schengen Agreement and more recently with the 2005 Prüm Convention. To the extent to which enhanced cooperation can work as an instrument of the “ever closer union”, without obliging all the Member States to accept the same ties simultaneously, it can be said to be a flexible tool, which is compatible with both visions of the Union. Precisely for this reason, however, it has a certain ambiguity.³⁷

Moreover, enhanced cooperation has been less relevant and significant than expected by its proponents. Soon after the entry into force of the Treaty of Amsterdam, EU institutions expressed concern about the development of enhanced cooperation outside the Treaties, as a consequence of enlargement.³⁸ After the big enlargement, few steps have been taken by national governments to use enhanced cooperation, even when they intended to “reinforce the process of integration” in the area of the EMU. They have preferred to stipulate international treaties, as they did in 2012 for the “Fiscal Compact”. It is interesting, therefore, to take it into consideration.

III.3. “INTERNAL” INTERNATIONAL AGREEMENTS: THE FISCAL COMPACT

In addition to enhanced cooperation, there is another instrument that can be regarded as an alternative to the revision of the treaties; that is, the conclusion of international agreements between either all Member States or only some of them. These are international treaties. They are, therefore, subject to the principles and rules of public international law on the law of treaties, in addition to the limits stemming from EU law,³⁹ for example with regard to the relations with third countries, under the doctrine of pre-emption. However, this “parallel track” has always existed, as was observed earlier with regard to the 1965 Treaty establishing the Benelux Economic Union (Benelux Treaty). It

³⁷ For this remark, see H. BRIBOSIA, *Les coopérations renforcées*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds), *Genèse et destinée de la Constitution européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives*, Bruxelles: Bruylant, 2007, p. 48. See also D. THYM, *The Political Character of Supranational Differentiation*, in *European Law Review*, 2006, p. 781 *et seq.* (seeing in this the emergence of an “asymmetric constitutionalism”).

³⁸ See B. DE WITTE, *Chameleonic Member States: Differentiation by Means of Partial and Parallel Agreements*, in B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, cit., p. 239.

³⁹ *Ibid.*, p. 232 (distinguishing partial agreements, concluded between some Member States within the institutional framework of the EU, from parallel agreements, involving all of them, and placing less emphasis on the involvement of third countries).

has become increasingly important during the economic and financial crisis. An interesting example is the Fiscal Compact.⁴⁰ An analysis of its process, rationale and relationship with EU law can help us understand the distinctive features of this form of differentiated integration.

When the crisis burst out, most political leaders affirmed that the existing legal framework needed to be adjusted. On the one hand, it was adjusted for all the Member States, through a further change of the Stability and Growth Pact, enacted in 1996 and already modified in 2005. On the other hand, it was adjusted by way of an international agreement negotiated by most members, but not by all. Initially, there was a Franco-German proposal to amend the Treaties in order to tighten the framework of budgetary rules for the Member States. That proposal was vetoed by the UK, on the grounds that its representatives had not managed to obtain adequate safeguard against the undesired impact of those tightened rules on the UK's financial services industry, an aspect that certainly has not lost its relevance in the context of Brexit. The negotiation process that followed was not easy for some members, who were afraid of meeting strong opposition during their ratification processes. In particular, the Czech Republic decided that it was not in a position to sign the treaty. Quite the contrary, Italy used that process instrumentally, in order to secure an amendment of the national constitution. Eventually, on 30 January 2012, 25 Member States agreed to the Fiscal Compact.

At its roots there is not only the fact that, even when action by a group of Member States is regarded as justified from the viewpoint of the Union's goals and processes, national politicians often show a strong preference for cooperating outside the Treaties. There are also two important factors, greater flexibility and time. If the decisions to be taken are left to be determined through unconstrained political processes, then an even greater flexibility can be attained. Accordingly, decisions will be reached on shorter time horizons than for comparable behavior regulated by EU rules. But there can be another justification for so doing: the opposition by one or more members to the proposed innovation, as it happened with the Fiscal Compact.

It is precisely because the Fiscal Compact is not an EU Treaty that it has a complex relationship with EU law. The preamble clearly reveals that the intent of the contracting parties is to proceed on the path of integration. They regard their economic policies "as a matter of common concern" and express their desire to "develop ever closer coordination of economic policies within the euro area".⁴¹ This intent is confirmed by Art. 2, which refers to the parties' will to "foster budgetary discipline through a fiscal compact". However, the Fiscal Compact has but a limited impact on existing EU rules for two reasons that are related but distinct. Firstly, the general basis of the rules set out by EU

⁴⁰ 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), usually referred to as "Fiscal Compact", available at www.consilium.europa.eu.

⁴¹ See the first two indents of the Fiscal Compact's Preamble.

Treaties is the prior consent of the States. It is this consensus that performs the basic legitimizing function. Without their consent, the two EU members that have not signed the Fiscal Compact, are not bound to respect the canons of conduct that it lays down, in particular the “rule” that “the budgetary position of the general government [...] shall be balanced on in surplus”.⁴² Secondly, and consequently, several provisions of the Fiscal Compact clarify that the new treaty entails no change of the obligations stemming from existing EU Treaties. While Art. 2 does so in a general way, by ensuring that the Fiscal Compact will be interpreted and applied consistently (“in conformity”) with EU Treaties,⁴³ Art. 3 does so with regard to the more innovative and controversial rule about budget deficits, which will be applied by the contracting parties “in addition and without prejudice to their obligations under” EU law. In addition to these limits, the new rules have a differentiated application. While they “apply in full” to the Member States whose currency is the Euro,⁴⁴ they apply to the other parties under the conditions set out in Art. 14. Leaving aside the conditions that referred to the entry into force of the Fiscal Compact, it can be observed that it will apply to the States with a derogation or with an exemption, as in the case of Denmark, as from the date when the decision abrogating that derogation or exemption takes effect.⁴⁵ This, incidentally, confirms that the position of Denmark (and the UK) differs from that of the other members of the EU. There is, finally, a provision that is increasingly important in the political debates about the EMU; that is, Art. 16 of the Fiscal Compact, which regulates the process of “incorporation”. It establishes that “within five years [...] the necessary steps will be taken [...] with the aim of incorporating the substance of this Treaty” into the legal framework of the Union. But precisely with regard to the substantial part of the Fiscal Compact in some Member States there is much less consensus than there was five years ago concerning the soundness of the tighter rules on public debt and deficit. Tighter budgetary standards have been criticized on grounds that they codify debt-reduction policies, with a huge and negative impact on social programs. What is controversial is, moreover, their imposition by a treaty, as opposed to a national constitution.⁴⁶

⁴² Art. 3, para. 1, let. b), of the Fiscal Compact.

⁴³ *Ibid.*, Art. 2, para. 1, which refers to both “the Treaties on which the European Union is founded” and to “European Union law, including procedural law”. The following indent puts even more emphasis on the necessity of consistency, by affirming that compatibility is requisite for applying the Fiscal Compact. See, however, P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *European Law Review*, 2012, p. 231 *et seq.* (arguing that the Fiscal Compact raises the question concerning the extent to which a treaty outside the confines of the Lisbon framework can confer new powers on EU institutions) and, for further remarks, K. TUORI, *The European Financial Crisis: Constitutional Aspects and Implications*, in *EUI Working Papers*, no. 28, 2012.

⁴⁴ Art. 1, para. 2, of the Fiscal Compact.

⁴⁵ *Ibid.*, Art. 14, para. 5.

⁴⁶ For critical remarks, see M. EVERSON, C. JOERGES, *Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance (“The Fiscal Compact”)*, in C.

In the light of these findings, the distinctive features of this form of differentiated integration, from an institutional point of view, can be viewed more clearly than hitherto. First, State consensus performs the usual basic normative function, in the sense that it is of central importance in shaping the interaction between the Member States. However, while in the case of the Maastricht clauses their consensus was expressed by all members and within the provisions of the Treaties, in this case it concerns most members, but not all. As a further consequence, while the Treaty of Maastricht distinguished between members with or without specific clauses, the Fiscal Compact makes EU membership more differentiated than before, with two categories of contracting parties, those within and outside the Eurozone, and the remaining two members of the EU that did not sign the new treaty. The question that thus arises is whether this type of agreement reinforces the perspective of a sort of Europe *à la carte*. This question will now be addressed.

III.4. A TWO-SPEED EUROPE: CONCEPT AND ISSUES

As observed initially, few topics have aroused as much controversy in the literature about the EU as differentiated integration. Opinions differ markedly both as to the justification for the existence of such form of integration and as to the shape that it should assume. It is, therefore, not surprising that different concepts are used in differing ways. However, if we move beyond nominalism, in an attempt to understand the nature of the interactions between the Union's partners, it becomes evident that a juxtaposition of some forms of differentiated integration is unjustified. This is the case of two-speed Europe and Europe *à la carte*. While some observers, including Usher, put them on an equal basis,⁴⁷ they differ. The term "two-speed Europe" designates processes that are used to reach more expedite decisions for some members of the EU, who sooner or later are joined by the others.⁴⁸ Quite the contrary, the term Europe *à la carte* designates a scenario in which certain countries would join some policies while others would join other policies, with the consequence that there can be only a very low common denominator.⁴⁹ For this reason, unlike the idea of two-speed, the idea of a Europe *à la carte* is hardly coherent with the first vision of a unified Europe, that which seeks to achieve an "ever closer union" between the peoples of Europe.

This does not mean, however, that the other idea, that of a two-speed Europe, is without difficulties. These become evident when considering the joint Declaration of the

HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar, 2017, p. 171. New changes have been envisaged by the European Commission, *The Five President's Report: Completing Europe's Economic and Monetary Union*, 22 June 2015, ec.europa.eu.

⁴⁷ J.A. USHER, *Variable Geometry of Concentric Circles: Patterns for the European Union*, in *International and Comparative Law Quarterly*, 1997, p. 253.

⁴⁸ For further analysis, see J.C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

⁴⁹ See R. DAHRENDORF, *A Third Europe*, in *EU Jean Monnet Lecture*, no. 3, 1979.

Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission of 25 March 2017 (The Rome Declaration), in the sixtieth anniversary of the Treaty of Rome.⁵⁰ The Rome Declaration has both a retrospective and a prospective, which deserve a detailed analysis.

The retrospective is a bit rhetoric, as it often happens in this type of documents. There is a strong emphasis on the decision “to bond together and rebuild our continent from its ashes” and on the construction of a “community of peace, [...] with unparalleled levels of social protection and welfare”.⁵¹ For sure, that of the EC/EU can rightfully be seen as a success story from the point of view of the achievement of the initial goals of peace and prosperity. The Rome Declaration proudly states “we have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law”.⁵² This statement is not unreasonable if we compare Europe, and more particularly the EU, with other regions of the world. However, as we shall argue later, there are some difficulties with it.

The prospective part of the Rome Declaration seeks to combine unity and diversity. Its *incipit* underlines the importance of the “construction of European unity”. The importance of unity is reiterated by the second paragraph, according to which “today we are united and stronger”. There is still another paragraph (the fourth) that begins by affirming the ambitious goal of “even greater unity” and continues with this challenging statement: “we will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later”.

There is, again, a similarity with enhanced cooperation; that is, flexible integration. But there is also a distinctive trait, in the sense that a two-speed Europe can be achieved in more than one way. Its essence is that integration requires some ‘pioneers’; that is, some members of the club choose to be more closely integrated in a new policy field, on the assumption that, if it works, the others will join them. This idea can be appealing for several reasons. It appears to be susceptible to revitalize the functional method, by encouraging sector or issue-specific coalitions of partners willing to proceed with the same pace. From the viewpoint of economic theory, it can make sense to say that, unlike other “clubs” or organizations, the EU provides several “goods”, which may

⁵⁰ Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission (The Rome Declaration).

⁵¹ *Ibid.*

⁵² *Ibid.*

have different relevance or significance for its members.⁵³ This may foster competition between different policy approaches.⁵⁴

There are, however, some difficulties with the strategy delineated by the Rome Declaration. First, it rests on an unclear assumption. It is questionable whether in the past what was really allowed was the acceptance of “different paces and intensity where necessary”. Arguably, the mechanisms concerning the EMU did much more than allowing different paces. They allowed some members of the club not to proceed on the path of monetary integration. This is of significance when thinking about a strategy aiming at achieving unity, whatever the veracity of the intent of the Rome Declaration’s authors.

Secondly, the idea to “act together, at different paces and intensity where necessary” may take different forms. Some are based on the Treaties, such as enhanced cooperation. Other forms of cooperation between the Member States lie outside the Treaties, as the Fiscal Compact, because not all EU countries agreed about it and its inclusion within the architecture of the EU requires a series of steps and, of course, the consensus of all partners. Those who think that it suffices to say that the EU will proceed “at different paces and intensity where necessary” are therefore mistaken. To borrow a term used in one of the first studies on differentiated integration, this was but a “misleading simple idea”.⁵⁵

Thirdly, it is not clear how the partners would move in the same direction. There is an inner tension between the desire to get all members of the EU involved and the role of the promoters or pioneers. For example, some political leaders who did not wish to join the Eurozone feared to be left behind. Their fear becomes more evident when, instead of multi-speed Europe, other terms are used, such as multi-tier Europe, which has a hierarchical and pejorative connotation.

IV. LEGAL MECHANISMS OF INTEGRATION BEYOND THE EU

With these *caveats* in mind, let us consider the forms of differentiated integration that involve other European countries. They include the treaties that are agreed by all the members of the EU with other groups of countries, such as the 1992 Agreement on the European Economic Area (EEA Agreement), or by some members with third countries,

⁵³ See J. PISANI-FERRY, *Intégration monétaire et géométrie variable*, in *Revue économique*, 1996, p. 495 *et seq.* (for the thesis that preserving the single market and enhancing convergence are distinct objectives).

⁵⁴ G. MAJONE, *Europe as the Would-Be World Power: the EU at Fifty*, Cambridge: Cambridge University Press, 2009. On “pioneer groups”, see B. DE WITTE, *Future Paths of Flexibility: Enhanced Cooperation, Partial Agreements and Pioneer Groups*, in J.W. DE ZWAAN, F.A. NELISSEN, J.H. JANS, S. BLOCKMANS (eds), *The European Union: An Ongoing Process of Integration: Liber Amicorum Alfred E. Kellermann*, The Hague: T.M.C. Asser Press, 2004, p. 141.

⁵⁵ F. DE LA SERRE, H. WALLACE, *Flexibility and Enhanced Cooperation in the European Union: Placebo Rather than Panacea*, Paris: Groupement d’Etudes et de Recherche “Notre Europe”, Research and Policy Paper no. 2, 1997, p. 5 *et seq.*

as it happens with the rules established under the Schengen Agreement. Space limits preclude an examination of other legal mechanisms, including those with the European countries that wish to become members of the EU, such as Serbia and Montenegro, and those with non-European countries that wish to establish a closer partnership with the EU, particularly in the Mediterranean area.⁵⁶

IV.1. A SINGLE MARKET BEYOND THE UNION: THE EUROPEAN ECONOMIC AREA

What has been said earlier with regard to monetary policy raises the further question whether a similar asymmetry occurs with regard to the other main instrument of the EU, the single market. This question is interesting in itself, for an understanding of the legal mechanisms of integration beyond the EU, and for its practical implications, because some observers suggest that the UK might be a member of the EEA.

The standard account about the EEA highlights three main features: first, that the EEA is an area where persons, goods, services and capitals can circulate freely, which exists since January 1st 1994, upon entry into force of the EEA Agreement; second, that membership of the EEA is open to EU countries as well as to the members (Iceland, Liechtenstein and Norway) of the European Free Trade Area Association (EFTA); third, that EFTA members must adopt most EU legislation concerning the single market and, correspondingly, are able to influence the content of such legislation by way of “decision-shaping” processes at an early stage of EU legislation.

There is nothing basically wrong with this standard account. However, for an adequate understanding of the available options, at least two other aspects must be taken into consideration. On the one hand, while the forms of differentiation that were examined previously imply an institutional differentiation within the Union, the EEA is a regulatory regime for applying the rules governing the single market beyond its borders. Consequently, some non-EU countries have simply accepted large amounts of substantive EC/EU law. There is, therefore, an asymmetric relationship between their legal orders and that of the EU. On the other hand, within the other members of the EEA, there is a difference between the paths followed by Norway and Switzerland. While Norway has negotiated through the EEA, Switzerland has not joined the EEA, but has entered into a series of bilateral agreements with the EU.

These findings support the following four conclusions. First, the EEA does not constitute a form of differentiated integration between the Member States of the EU. It is, rather, a form of cooperation between the EU and other European countries. Secondly, and consequently, although it could be said that such cooperation might be beneficial to a further integration of non-EU members, this is just a potentiality. Meanwhile, it is a

⁵⁶ See, for further analysis, R. WESSEL, *Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe*, in J.W. DE ZWAAN, F.A. NELISSEN, J.H. JANS, S. BLOCKMANS (eds), *The European Union*, cit., p. 123 et seq.

cooperation that is limited to the rules governing the single market and is, therefore, coherent also with the vision of a wide and loose union. Thirdly, such cooperation is based on a variety of legal sources, as it can be established either by accessing EFTA or by negotiating several bilateral agreements. Accordingly, referring to the EEA only provides a generic solution; that is, the devil is in the details. Finally, the asymmetry that has been noticed is relevant from a twofold viewpoint: theoretically, it confirms that relations between legal orders can be either symmetric or asymmetric; institutionally, it is problematic with regard to democratic standards.

IV.2. SCHENGEN'S MIXED MEMBERSHIP

As observed initially, there are two distinct frames in the present analysis: one concerns the institutional mechanisms of differentiated integration within the EU and the other the legal mechanism of integration outside the Union. It might, therefore, come as a surprise that the rules of the Schengen Agreement are examined here, but this is not unjustified.

It can be helpful to begin by saying that, while the Treaty of Maastricht allowed differentiated integration within a partially new area, that of monetary policy, the Schengen Agreement of 1985 was more problematic, because its object was the regulation of free movement of persons, as distinct from citizens or workers. This was one of the pillars of the European Community, as it was envisaged by the Treaty of Rome in 1957; that is, a Community where the citizens of the Member States could freely travel. However, almost 30 years later, systematic controls of identity documents were still in place at the borders between most Member States, with the notable exception of the Benelux countries. It was precisely these countries, together with France and (West) Germany, which in 1985 signed the agreement aiming at progressively dismantling common border controls. The contracting parties agreed on the harmonization of their visa and asylum policies, allowing their nationals and other residents to cross borders without police controls.

This legal framework has been subsequently modified in three ways. First, in 1990 the Agreement was supplemented by the Schengen Convention, which established an area without border controls.

Secondly, and more importantly, during the Intergovernmental Conference that drafted the Treaty of Amsterdam all the Member States, except the UK and Ireland, agreed to incorporate the Schengen rules within the Union's legal framework. The Protocol no. 19 integrating the Schengen Acquis into the Framework of the European Union (Protocol no. 19) annexed to the Treaty clarified that such incorporation was achieved with a view to developing more rapidly "an area of freedom, security and justice". It also noticed that Ireland and the UK had not signed the Schengen Agreement, though they could accept some of its

provisions and could at any time request to take part in the entirety of the *acquis*.⁵⁷ Conversely, Protocol no. 19 mentioned the intent of Iceland and Norway to become bound by the Schengen rules. The form of “cooperation” that thus emerged was based on a “mixed” membership.⁵⁸ This feature has been confirmed by later agreements, for example with Switzerland. In brief, the enhanced cooperation that initially was promoted only by some members of the EU has been opened to other European countries.

Thirdly, the incorporation of the Schengen *acquis* allowed EU institutions to step in. In particular, the Council replaced the Executive Committee and the Court of Justice was enabled to exercise judicial review within certain limits,⁵⁹ which have mainly been eliminated by the Treaty of Lisbon, together with the “three-pillars” structure of the EU.⁶⁰ For example, the Court of Justice has found that the application of a rule set out by the Schengen Agreement is incompatible with the right of free movement that stem from Community law for third country nationals who are family members of EU citizens.⁶¹

Once again, when considering differentiated integration, it is clear that the voluntary consensus of the State, of each State, is of central importance. Two elements are crucial in determining the nature of the voluntary consensus. First, the voluntary nature of the agreement is not vitiated by inequality in the bargaining power of the parties, because the rules that are incorporated have been set out only by some of them. On the one hand, as noticed by the Protocol’s Preamble, those rules “aimed at enhancing European integration”. Their goal was thus a deeper integration. On the other hand, though the *acquis* must be preserved, EU institutions can develop it. For example, they have established a European Border Surveillance System.⁶² Second, with the Treaty of Amsterdam it has become clear that even with regard to one of the central elements of the EC, the free movement of persons, where Union’s action would have been justified, a deepened integration remains subject to the voluntary consensus of each State. It is

⁵⁷ Art. 4 of Protocol no. 19 Integrating the Schengen *Acquis* into the Framework of the European Union (Protocol no. 19).

⁵⁸ *Ibid.*, Art. 1.

⁵⁹ *Ibid.*, Art. 2. For further analysis, see H. WALLACE, *Flexibility: A Tool for Integration or a Restraint on Disintegration?*, in K. NEUNREITHER, A. WIENER (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*, Oxford: Oxford University Press, 2000, p. 175 *et seq.*

⁶⁰ Art. 276 TFEU, keeps some limits, on which see P. CRAIG, *The Treaty of Lisbon: Process, Architecture and Substance*, in *European Law Review*, 2008, p. 144.

⁶¹ Court of Justice, judgment of 31 January 2006, case C-503/03, *Commission v. Spain* [GC], paras 33-35. On the issues concerning non-EU nationals, see C. HARLOW, E. GUILD (eds), *Implementing Amsterdam: Immigration and Asylum*, Oxford: Hart, 2001, and G.I. WOLF, *Efforts toward “An Ever Closer” European Union Confront Immigration Barriers*, in *Indiana Journal of Global Legal Studies*, 1996, p. 228 (noting the increased perception of a “fortress Europe”).

⁶² See Regulation (EU) 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), and Court of Justice, judgment of 8 September 2015, case C-44/14, *Spain v. European Parliament and Council* (rejecting the action brought by Spain against the possibility that the UK is involved in the new regime).

in this sense and within these limits that the Schengen Agreement has been considered as a sort of *interim* arrangement, in view of a *communitarisation* of its rules.⁶³

IV.3. A EUROPE OF CONCENTRIC CIRCLES: A “MISLEADING SIMPLE IDEA”

In the light of the remarks that have made thus far, another interesting and important question arises; that is, whether the various forms of interaction within and beyond the EU can be summarized by the referring to the idea of a “Europe of concentric circles”.

As observed for other terms, this metaphor has both a descriptive and a prescriptive side. Descriptively, it is noticed that some non-EU countries have accepted to apply the principles and rules of the single market, an aspect to which we will return later. Likewise, Turkey has accepted certain parts of EU law in the framework of the customs union that it agreed with the EU. Other Balkan countries have accepted part of the *acquis communautaire* and in particular the general principles of law developed by the Court of Justice, as is normally requested to the States that wish to become members of the EU. Conversely, the UK is not involved in the border-free Schengen area, which is so strategic for the freedoms of EU citizens to travel without visas or passports, and other five members of the EU followed it, including Ireland, which does not wish to take part in common actions in the field of defence. The general conclusion that is drawn from all this is that there is a greater differentiation of EU law than there was in the past. The description turns into a prescription, when it is observed that this is the inevitable price to pay for the construction of a larger area of peaceful cooperation in Europe.

There are, however, some difficulties with this irenic view of a Europe of concentric circles. First of all, the outer circle, that of non-EU countries, is far from being homogeneous, because some of them joined the EEA, while another has only agreed on a customs union.

Secondly, the inner circle – the EU – is itself differentiated not only with regard to monetary and fiscal issues. On the one hand, within the EU there are different views about the construction of the area of freedom, security and justice, as we have seen with regard to the Schengen *acquis*. Moreover, only 14 members have ratified the Prüm Convention, which aims at strengthening police cooperation through exchange of information and, thus, security. On the other hand, there are very different views with regard to one of the main values upon which the EU is founded; that is, the respect for fundamental rights. When the last Intergovernmental Conference discussed about the incorporation of the Charter, some Member States dissented. A protocol added to the Treaty of Lisbon now affirms that the Charter does not extend to Poland and the UK the “ability” of the Court of Justice to “find” that their “laws, regulations or administrative provisions, practice or actions’ are inconsistent with the Charter”.⁶⁴ Legal scholarship

⁶³ See B. DE WITTE, *Chameleonic Member States*, cit., p. 241.

⁶⁴ Art. 1, para. 1, of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (Protocol no. 30). See also Declaration no. 61 by

has expressed strong reservations concerning the legal value and effects of this protocol, which on other hand reaffirms the obligations stemming from EU law, including its general principles and thus fundamental rights as they stem from the European Convention on Human Rights (ECHR) and common constitutional traditions.⁶⁵

A more critical remark might be that any attempt to limit the scope and effectiveness of individual rights, even indirectly, for example through a limitation of judicial independence, might lead to the destruction of the moral foundations on which the “legal order of a new kind” has been built. Interestingly, this was precisely the point of attack of the Commission in respect of Polish legislation and the Court of Justice endorsed its argument. The Venice Commission, too, criticized certain measures taken by Polish policy-makers from the viewpoint of the Council of Europe’s standards concerning the rule of law.⁶⁶

For the sake of clarity, I am at present making no claim about the nature of this controversy and the measures that could be adopted in order to solve it. This is a complex question that must be considered on its own, not tangentially. The present aim is more limited. It is to enquire whether one can coherently construct a theory of differentiated integration that rests on the assumption that there is an inner and more integrated circle – the EU – and an outer and less integrated circle. The conclusion that is suggested here is that this is not plausible. Whatever its apparent appeal, the idea of a Europe of concentric circles is but another “misleading simple idea”.⁶⁷

V. CONCLUSION

This *Article* has two major themes. The first is that there is a tension inherent between two political visions of Europe, one centred on the “ever closer union” and the other on the achievement of a wide and loose union. Precisely because these are not simply different, but conflicting political visions of what the EU is and should be, it is necessary to be fully aware of their consequences, which is not always the case. A clear example is provided by the illusion, which emerges from the recent Rome Declaration, that it is possible to live together harmoniously for a prolonged amount of time despite conflict-

the Republic of Poland on the Charter of Fundamental Rights of the European Union (Declaration no. 61), affirming that the EU Charter does not affect in any way the Member States’ capacity to legislate in the sphere of family law and public morality.

⁶⁵ See J. ZILLER, *Les nouveaux traités européens: Lisbon et après*, Paris: Montchrestien, 2008, p. 105; I. PERNICE, *The Treaty of Lisbon and Fundamental Rights*, in S. GRILLER, J. ZILLER (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Wien: Springer, 2008, p. 235 *et seq.* See also P. CRAIG, *The Treaty of Lisbon*, cit., p. 163 (observing the UK’s insistence on the Protocol is “problematic”).

⁶⁶ See Venice Commission, Poland – Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session on 11 December 2017, CDL-AD(2017)031-e.

⁶⁷ F. DE LA SERRE, H. WALLACE, *Flexibility and Enhanced Cooperation*, cit., p. 5.

ing ideas about the ultimate ends of the European construction and, to some extent, about what its common values concretely mean. The second theme concerns differentiated integration. When considering the institutional and legal mechanisms of integration that exist within and outside the EU, such as the EMU and the EEA, respectively, it soon becomes evident that some of them are more coherent with one vision of Europe than with the other one.

